No. 15865

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM CECIL POOL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal From the United States District Court for the District of Nevada.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Appellee's brief is replete with statements and arguments which should be rebutted if this Honorable Court is to have an opportunity to resolve the true issues presented by this appeal.

I.

Appellee's Treatment of the Facts.

Appellee has presented a "Counterstatement of the Case" which is marked by its failure to characterize the witnesses and the testimony in a manner which will enable the Court to determine the strength or weakness of the evidence of Appellant's guilt.

Nowhere in Appellee's brief can we find a reference to the fact that both of the complaining witnesses Sage and Gaither were convicted felons who had been subjected to imprisonment in the Nevada State Prison as a result of the Appellant's investigatory efforts. Nowhere in the

Appellee's brief can we find a reference to the fact that key witness Victor L. Carlson admitted that he committed perjury before the Clark County grand jury. Nowhere in the Appellee's Brief can we find that witness Carlson had signed, one inconsistent statement [Ex. C] before he learned of an impending grand jury investigation [R. 198]; indeed, the Appellee has misstated the facts by alleging in its brief (p. 7) that both of Carlson's statements were made in contemplation of the grand jury investigation in order to get the "heat off" and later by arguing that Exhibit C—made before Carlson found out about a grand jury investigation—was merely cumulative of Exhibit D—made after he learned of the grand jury investigation.

It was only by ignoring the character of the principal evidence that the Appellee was able to conclude that it is hard to imagine more positive and clear-cut evidence of the commission of a crime (Appellee's Br. pp. 25-27). Appellee first cites the testimony of Sage and Gaither, the convicted felons; then cites the corroboration offered by witness Carlson, the accomplice-perjurer; and then concludes that there was strong evidence of guilt. Even the testimony of Dr. French is distorted; for he could not give an opinion as to the cause of Sage's wounds [R. 80]. Yet Appellee would have the Court believe that he had corroborated the prosecution's case because he said it was possible for the injury to result from Sage getting out of a moving vehicle if he hit a pipe or gate pipes [R. 80] and that it was also possible for the bruises to have been caused by a flashlight [R. 81].

The significance of these omissions and distortions is obvious when we realize the standards established by the United States Court of Appeals for the Ninth Circuit in

determining whether evidence of guilt is "strong" or "weak." We respectfully submit that the determination must be based on evidence *other than* the testimony of witnesses whose credibility is in doubt because they are convicted felons (Sage and Gaither) or an accomplice-perjurer (Carlson).

In the recent case of *Mims v. United States* (9th Cir., Mar. 28, 1958), No. 15,654, the Court of Appeals refused to find as a valid basis for reversal the failure of the trial court to instruct the jury that the testimony of an accomplice and a perjurer must be viewed with caution. The Court cited the failure of the defendant's trial counsel to take exception to the charge. The Court further found that the error was not committed under such "exceptional circumstances" as to justify the appellate court to reverse on its own notice, because sufficient instructions had been given by the trial judge and the testimony of the accomplice and of the perjurer was supported and corroborated by other evidence. The Court stated on Slip Opinion, page 6 as follows:

> "It is our opinion that there existed other material and substantial testimony in the case corroborating and strengthening the testimony of the accomplice Sabbath so as to make the evidence of defendant's guilt 'strong' rather than 'weak.' This was sufficient evidence to permit the jury to find defendant guilty beyond a reasonable doubt *without the testimony* of either Sabbath or Barrett, or both of them." (Emphasis supplied.)

The instant case is the exact opposite. There is virtually no evidence to permit the jury to find Appellant guilty beyond a reasonable doubt without the testimony of the convicted felons and the accomplice-perjurer. It

naturally follows that the evidence of Appellant's guilt is "weak"; and this conclusion must permeate our view of the entire case, because it is obvious that errors which were committed would have a "substantial influence" on the outcome of the case.

By a careful process of omission, Appellee has placed itself in an untenable position to argue:

(1) That the voluntary, unresponsive statement of the Clark County District Attorney regarding his reasons for advising against a Clark County indictment was "fairly innocuous in itself" (Appellee's Br. p. 27);

(2) That the trial judge's charge to the jury "hardly merits appellant's characterization that it constitutes 'plain error'" (Appellee's Br. p. 22);

(3) That short of having a television camera trained on the spot where the beatings occurred, it is hard to imagine more positive and clear-cut evidence of the commission of a crime (Appellee's Br. pp. 25-26);

(4) That no prejudice resulted from the trial judge's exclusion of documentary evidence to impeach witness Carlson during his cross-examination (Appellee's Br. p. 28).

However in *Mims v. United States, supra,* the Court implied that if the cited errors had consisted of the propounding of an improper question by government counsel *and* the failure of the trial judge to caution the jury on the credibility of an accomplice, both errors would have added up to "exceptional circumstances" justifying reversal; and the Court cited *United States v. Levi* (7th Cir., 1949), 177 F. 2d 827.

The United States Court of Appeals for the Ninth Circuit set forth the following test (quoting from *Kotteakos v. United States* (1946), 328 U. S. 750, 763, 764), on Slip Opinion, pages 3-4:

> "And the question is, not were they (the jury) right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting. (Citations omitted.) * * *
>
> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

Therefore, when we answer the arguments in Appellee's brief, we do so in the light of our analysis of the evidence that without the testimony of convicted felons Sage and Gaither and accomplice-perjurer Carlson there would have been nothing on which to base a conviction in this case.

II.

The Voluntary Unresponsive Statement of the Clark County District Attorney.

Appellee contends that no error occurred in the testimony of the Clark County District Attorney, because the Appellant's trial counsel could have anticipated the inadmissible answer (Appellee's Br. p. 23), the Appellee was not responsible for the error because the witness was not a Government witness (Appellee's Br. p. 24), the Appellee had a duty to clarify the reference to the witness' role in the state grand jury proceedings (Appellee's Br. p. 25) and the evidence of Appellant's guilt is strong (Appellee's Br. pp. 25-26).

First, Appellant's trial counsel could not have anticipated the answer, because the question propounded only sought a clarification of the witness' "participation in part" in the state grand jury proceedings. It did not seek an explanation of the reasoning used by the Clark County District Attorney to advise the state grand jury that it had no jurisdiction to issue an indictment.

Secondly, it is immaterial that the witness was a defense witness, because it is no answer that the Appellee was not responsible for the error. In *Nalls v. United States* (5th Cir., 1957), 240 F. 2d 707, 710, which granted a new trial because of a voluntary statement of a police officer, the Court of Appeals made it clear that the basis of the reversal was an unreponsive statement volunteered by City Policeman Scott,

> ". . . for which the Government was not responsible . . ."

Third, the Government was not under a duty to have the witness explain his reasoning which he presented to

the Clark County grand jury. The most that could have been explained was the witness' role as a legal advisor to the grand jury.

III.

The Inadequate Jury Charge.

Appellee has confused the issues in its brief by merging separate and distinct propositions into one argument. In short, Appellee has imputed arguments to us which we had not made, for example:

(1) That the premise of Appellant's arguments is that the Appellee must prove that confessions were secured as a result of the brutality (Appellee's Br. pp. 12, 14-15);

(2) That Appellant contends that there cannot be a successful prosecution under 18 U. S. C. 242 without proof that the official succeeded in coercing the confession (Appellee's Br. p. 16).

These statements are unfair, because Appellant did not challenge the charge to the jury on this basis. Indeed, Appellant cited examples of cases which were based on the assault of a prisoner by an official custodian, as distinguished from the extortion of a confession by force and violence (Appellant's Main Br. pp. 40-42). True, Appellant did raise a question as to the interpretation of the indictment and Appellant contended that the indictment alleged the successful procurement of a confession by force and violence in support of Argument III that there was a variance between the indictment and the proof and Argument VI that the trial court amended the indictment in its charge. However, this contention was completely unrelated to Argument II which challenged the adequacy of the entire jury charge and added that

the error was sufficiently severe to justify reversal despite the failure of Appellant's trial counsel to take exception to it.

First, the jury charge was devoid of any cautionary instructions regarding the credibility of the convicted felons or the accomplice-perjurer.

Certainly when we consider the significance of this testimony in the instant case, "the better practice" to paraphrase *Holmgren v. United States* (1910), 217 U. S. 509, would have been for the trial judge to caution the jury to take into consideration the effect of the felony convictions on credibility[1] and to instruct the jury that the testimony of an accomplice and a perjurer are to be received with great caution and believed only when corroborated by other material testimony adduced in the case.[2]

The trial court failed to issue these cautionary instructions and thus left the jury free to treat the evidentiary record as one leaving no alternative to the jury but to believe it, when its true status was that of a record clouded by the questionable credibility of key witnesses.

Appellant repeats as we stated in our main brief that throughout the charge there is confusion as to which Constitutional right the prosecution must prove the prisoners were deprived of.

Furthermore, Appellee failed to respond to Appellant's contention that the trial judge took from the consideration

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[1]*Michelson v. United States* (1948), 335 U. S. 469, 482-483, 69 S. Ct. 213, 221-222, 93 L. Ed. 168; *Rosen v. United States* (1918), 245 U. S. 467, 38 S. Ct. 148, 62 L. Ed. 406; *Greer v. United States* (1918), 245 U. S. 559, 38 S. Ct. 209, 62 L. Ed. 469.

[2]*Mims v. United States* (9th Cir., 1958), No. 15,654.

of the jury the question whether the Appellant mistreated his prisoners, when he stated [R. 14]:

> ". . . then the ordeal to which the defendant, Pool, subjected both Sage and Gaither . . . constituted a violation of the Federal statute."

IV.

The Delay in Admitting Exhibit C to Impeach Witness Carlson.

Appellee's argument that there was no reversible error in the trial court's temporary exclusion of evidence to impeach witness Carlson during his cross-examination includes the statement that the exclusion of Exhibit C was not prejudicial because Exhibit D had been admitted, Exhibit C was merely cumulative and that the jury had a full statement before it for the purpose of impeachment (Appellee's Br. pp. 28-29).

Appellee has ignored the fact that Exhibit C had been signed before witness Carlson learned of the grand jury investigation and therefore carried more weight than Exhibit D, which Carlson could at least attempt to explain away as having been made in contemplation of the grand jury investigation in order to get the "heat off." Indeed, Appellee has misstated the timing of Exhibit C at least twice in its brief (Appellee's Br. pp. 7, 29). Therefore, for the final time we state that on cross-examination witness Carlson admitted that he learned of the grand jury investigation one or two days after he signed the statement identified as Exhibit C [R. 198]. Therefore, Exhibit C was not merely cumulative of Exhibit D.

Appellee suggests on page 29 of its brief, footnote 10, that Appellant was inconsistent in alleging prejudice from the delay in the admission of Exhibit C and in another

point in the brief alleging that the jury was strongly impressed by certain statements made by the Clark County District Attorney simply because they were made at the end of the case. Appellee has clouded the issue. There is nothing inconsistent in contending that a written statement used to impeach a key witness should be introduced during his cross-examination or it loses its effectiveness and contending elsewhere that an oral statement made before the retirement of the jury carries great weight. These are mutually exclusive arguments and each may be proper under its own circumstances.

V.

The Improper Injection of a Juror's Affidavit Into Appellee's Brief.

Appellee has cited in its brief an affidavit of one of the jurors filed in connection with Appellant's motion for a new trial, which commented on the overwhelming character of the evidence of guilt (Appellee's Br. pp. 26-27). This was improper and should be stricken from Appellee's brief. It deserves no further argument. This is not the instrument to be employed to determine whether an error by the trial court meets the "substantial influence" test of the case of *Nims v. United States, supra.*

Indeed, Appellant out of respect for the well recognized principle that it is improper to impeach a jury verdict by affidavits relating to their deliberations did not even print as a part of the record that Appellant's affidavits in support of a motion for new trial. However, since Appellee has inserted the affidavit of a juror into its brief, we feel compelled to set forth in the appendix an affidavit which quotes the foreman of the jury, which convicted Appellant herein and which reveals the prejudice which prevailed among the jurors.

VI.

The Prosecution's Case Clashes With the Policy of the Federal Civil Rights Act.

The witnesses relied on by the Appellee herein create a policy question which transcends this case and affects all prosecutions under the Federal Civil Rights Act. Offenses of this type are naturally committed in secrecy. Police officials guilty of brutality will not commit their illegal actions in view of witnesses. Consequently, the usual witnesses are the victims or accomplices.

However, in this case the Government has gone one step further. The victims have never asserted their innocence of the crime for which they were arrested. Indeed, they have both voluntarily admitted their guilt of felonies for which they were convicted and sentenced under the penal laws of Nevada. Both would naturally seek revenge against the police officials who apprehended them. Both can be challenged seriously by a jury on the issue of credibility.

The corroborating witness was more than an accomplice. He had been discharged from the police force. He had committed perjury in state grand jury proceedings. He had signed inconsistent statements. Needless to say, any intelligent jury if properly instructed could have disbelieved him.

The trial court gave no cautionary instruction on credibility. Obviously the jury believed these witnesses. And without putting up the warning signals, the court left the jury free to be impressed by testimony which appears overwhelming until dissected.

In turn, the Appellant was subjected to a prosecution of great danger to all police officials. The very persons

whom he imprisoned now confront him in a counter-prosecution. Witnesses whose credibility is in doubt due to time-honored principles of legal procedure are permitted to inflict the same punishment on the Appellant as he did on them when he prosecuted them for the crimes which they committed. We recognize that sometimes this is the only way to convict a guilty police officer. At the same time, the courts must protect a police officer from a revenge prosecution. And the danger is even more acute where such a prosecution is encountered for political motives by forces which were antagonized by the very same officer.

We sympathize with the aims of the Civil Rights Acts. We appreciate the function of the federal jurisdiction in this area of the penal law.

We also know that the surest way to destroy the effectiveness of this essential federal instrument is to strip the protection normally afforded to a local police officer by judicial omission and judicial error. The Congress of the United States did not intend to provide a remedy of revenge to felons convicted and imprisoned by state officials. This Honorable Court should make certain that a prosecution of this type is accompanied by procedural safeguards which achieve the true objectives of the United States Government.

Conclusion.

For the reasons stated, the judgment of guilty as to the Appellant should be reversed and the cause remanded for a new trial.

Respectfully submitted,

Morton Galane,

Attorney for Appellant.

APPENDIX.

In the United States District Court for the District of Nevada.

United States of America, Plaintiff, vs. William Cecil Pool, Edward Ellis Clifton, Defendants. Case No. 136.

Affidavit.

State of Nevada, County of Clark—ss.

Herman M. Greenspun, being duly sworn, deposes and says:

That immediately following the trial in the above captioned matter and after the jury had made its findings of guilty, he had conversation with the Foreman of the jury, C. L. Martin. That the said C. L. Martin advised him among other things that his, Martin's son was arrested by the police while hitch-hiking through a city in Arizona on the way home from college. That not only did the police refuse to permit his son to make a telephone call to his father in Las Vegas but did in fact administer a beating to him because of the request. The foreman advised that this was present in his mind at the time of the deliberation and further advised that, "These cops who disregard the rights of others and use brutality have to be taught a lesson."

Herman M. Greenspun.

Subscribed and sworn to before me this 29th day of October, 1957.

Barbara J. Greenspun,

Notary Public.

My Commission Expires Mar. 17, 1960.

(Seal)